IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SENTEGRA, LLC,	)	
Plaintiff,	)	Case No. 1:15-cv-09266-VEC-SN
v.	)	ORAL ARGUMENT REQUESTED
SAMSUNG ELECTRONICS AMERICA, INC.,	)	
Defendant.	)	

PLAINTIFF SENTEGRA'S OPPOSITION TO
SAMSUNG'S PARTIAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

This is an unusual patent case. The Court has been asked to evaluate the eligibility of a patent covering now commonplace technology, even though the application for the patent was filed over sixteen years ago. What we now take for granted—that handheld devices such as smartphones and tablets can be used to purchase, store and redeem a validated theater ticket—presented technological challenges when the '627 Patent's inventions were conceived.

Defendant claims that the '627 Patent is easily dismissed as ineligible at the pleading stage, without any need for discovery, expert opinion or claim construction. In support, Defendant rolls a boulder of case law along with its motion, but gives only the lightest touch to the facts deemed pled in the complaint—the patent's claims, the patent's specification and the patent's prosecution history. These facts are given just enough lip service to oversimplify the issues and present the '627 Patent as allegedly ripe for dismissal.

Defendant's § 101 challenge has fatal flaws. Under *Alice* step one, Defendant pigeon-holes all of the claims into a manufactured abstract idea of "securely purchasing a ticket." But this misstates the technological problems addressed by the '627 Patent, and overlooks key portions of the '627 Patent specification and prosecution history. The claims themselves show that the patent solved technological problems specific to handheld devices themselves, such as how to *redeem* a ticket existing on a mobile device. These problems did not plague traditional tickets, such as self-validating printed tickets, and thus the patent's solutions to this problem are not directed to just "securely purchasing a ticket".

Under *Alice* step two, the '627 Patent claims an improved "wireless handheld device" that adds something more to avoid preempting every instance of securely purchasing a ticket. For instance, the claims require non-generic hardware (e.g., short-range wireless hardware) in combination with specialized software (e.g., for validating a ticket on a handheld device that is not self-validating). Defendant makes sweeping allegations about what was generic and well-known technology, but fails to properly support these arguments in the state of the art at the time of the invention (in 2000). Defendant also ignores that the claims are directed to an ordered combination of components for a handheld device that never previously existed—comprised of at least a user input device, wireless hardware, short-range hardware, biometric hardware and specific software instructions. Together, the claimed ordered combination contains an "inventive concept" that cannot preempt all "secure purchases of a ticket," either manually or over the Internet.

Defendant's *IPXL* challenge is equally flawed because Defendant skips over key limitations in the claim. The Federal Circuit recently upheld patent claims as not indefinite under *IPXL* that were drafted identically to those of the '627 Patent. That case shows that when the '627 Patent claims recite the "microprocessor, executing" certain program instructions, it is a *capability* of the microprocessor, not a required method step of the claim. The limitations that follow ("accesses", "receives", "communicates", etc.)—which form the focus of Defendant's argument—simply explain what happens when that microprocessor is "executing" the program instructions. In other words, they further elucidate a *capability* of the claim (execution by the microprocessor of the program instructions,) and thus, cannot be required method steps.

FACTS

I. The '627 Patent claims an improved handheld device.

The '627 Patent identifies the technological problem it solved: "A way to ***personally control*** electronic ticketing is needed." ('627 Patent at 1:52-53) (emphasis added).

Authorization tickets[1]—such as theater, movie or airline tickets—were traditionally purchased in paper form, but "many merchant services [also] provide[d] electronic ticketing." (*Id.* at 1:43-50). Paper and electronic tickets, however, were flawed—"hardcopy tickets can be lost" and "[e]lectronic ticketing relies on the integrity of a particular merchant's system." (*Id.* at 1:50-52).

Additional problems existed even if a ticket was capable of being downloaded to an existing handheld device. For instance, how could the downloaded ticket be redeemed to gain entry to the theater? Hard-copy tickets were self-validating and easily handed to the theater usher. Electronic tickets issued by the theater itself were validated at the box office will-call window. Yet, no solution existed that allowed a user to actually redeem and validate a ticket that was purchased and downloaded to a handheld device—thereby allowing the user's handheld device to "personally control" electronic ticketing.

The handheld device claimed in the '627 Patent provided a tangible solution to this technological problem. Those solutions embody more than the commercial practice of purchasing a ticket, or redeeming a paper ticket—they are actual improved handheld devices. The '627 Patent unlocked the potential for users to conduct a full ticketing transaction wirelessly, from purchase to actual *use* of the ticket, using only the patent's improved wireless handheld device. To do this, the patent claimed improvements to existing devices to solve the technological problem of how to ultimately *redeem* a ticket downloaded to a handheld device.

First, the patent equipped the handheld device with specific non-generic hardware, including "short-range wireless communication hardware." (*See e.g.,* '627 Patent at 62:61-63;

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[1] For the ease of explanation and argument in this brief, Sentegra will refer to "authorization certificates" as tickets, and will repeatedly use the example of a theater ticket for entry into the theater. Sentegra does not dispute that an embodiment of the term "authorization certificate" includes a ticket, such as theater ticket. However, Sentegra reserves the right to dispute during the *Markman* hearing that the phrase "authorization certificate" should be construed to be limited to a ticket, such as theater ticket, and only for the purpose of gaining entry into the theater. Sentegra's arguments would equally apply to airline boarding passes, for example.

see also at 21:63-65 ("transmit the eTicket(s) . . . and encrypted security information via the infrared interface [or other short-range wireless interface] configured on the User's PDA to the redeeming merchant's infrared interface device"). The handheld device "communicate[s] with a [point of purchase] ticket terminal" where the device "hold[s] electronic authorization tickets, or eTickets to use for particular service or [to] attend a particular entertainment event." ('627 Patent at 6:12-16). In this way, the '627 Patent improved existing handheld devices, because by adding this hardware, the device could be "***transported by the user*** to the location of the event or service ***and would then be used*** by the user," to actually redeem the downloaded ticket. (*Id.* at 8:9-13) (emphasis added). It also obviated the need to print out and bring "easily lost" paper tickets, or to rely on the "integrity" of a theater's electronic ticketing systems. (*Id.* at 1:50-52).

Second, the claimed handheld device contains a microprocessor with the capability to execute specific software (program instructions) allowing for the download, storage and validation of the downloaded ticket on the handheld device. For example, in order to enable later validation of a ticket downloaded to a handheld device, Claim 1 requires program instructions that, when executed,

> activates a communication by said content host computer device to said content provider computer device of confirmation data comprising said payment information, security information, and said particular authorization certificate, said content provider computer system being accessible by point-of-sale devices for said particular merchant.

('627 Patent at 63:33-38).

During prosecution,[2] Jon Shore (the named inventor) explained that with this limitation, the claimed handheld device "also triggers, as claimed, the host computer device sending a copy of the authorization certificate and relevant security information to

[2] Defendant acknowledges the '627 Patent's prosecution history is before the Court on its motion to dismiss. (Mot. at 7 n.2).

the merchant's computer system." (Silbersher Decl. Ex. A at 10). Triggering a transmission of the ticket (along with "relevant security information") to the merchant's point-of-use terminals allowed the merchant to later validate the ticket on the handheld device: "the merchant's computer system could then compare the information provided by the claimed wireless device, with the information that had been provided by the content host computer system." (*Id.* at 10-11; *see also* '627 Patent at 21:65-22:3 ("The redeeming Merchant's computer would receive the transmitted eTicket data and would compare the transmitted eTicket data with data previously transmitted by ticketdownload.com and saved by the redeeming Merchant's computer system in its own database 516.")).

The addition of this software, acting in combination the "short-range wireless communication hardware," is how a ticket existing on a handheld device that is not self-validating (unlike a hard-copy ticket or an electronic ticket maintained in the merchant's system) can be redeemed: "the claimed limitations would therefore be useful for validating electronic redemption of the electronic authorization certificates, such as, for example, electronic tickets." (*Id.* at 11, citing support from the '627 specification).

Finally, the claims are also directed to an ordered combination of hardware and software addressing technological problems with existing devices—namely, how to buy, store, use and validate an electronic ticket using only a handheld device. This ordered combination included, in a preferred embodiment, "LCD display **1109**, . . . (input keys) **1111**, an optional biometric chip **1105**, and an infrared transceiver **1100,**" among other communication and processing hardware required in the claims. ('627 Patent at 34:36-39). In combination with the software program instructions to not only purchase a ticket, but also store, use and validate it—using only the mobile device itself—the '627 Patent addressed technological problems specific to handheld devices that existed upon the patent's filing date, in the year 2000.[3]

ARGUMENT

II. The '627 Patent is not invalid under 35 U.S.C. §101.

A. *Alice* motions at the pleading stage face a high burden.

Dismissing a patent suit at the pleading stage for lack of patentable subject matter requires overcoming a high burden—the "*only* plausible reading of the patent must be that there is clear and convincing evidence of ineligibility." *Ultramercial, Inc. v. Hulu, LLC*, 722 F.3d 1335, 1339 (Fed. Cir. 2013) (emphasis in original). Patents that have been granted by the Patent Office are presumed valid under the Patent Statute (35 U.S.C. §282), and likewise, the burden to invalidate them is a high one—"clear and convincing evidence of ineligibility." *Ultramercial*, 772 F.3d at 1339.[4]

The Federal Circuit has observed that *Alice*'s two step test is difficult in practice to implement: "Distinguishing between claims that recite a patent eligible invention and claims that add too little to a patent-ineligible abstract concept can be difficult, as the line separating the two is not always clear." *DDR Holdings, LLC v. Hotels.com L.P.*, 773 F.3d 1245, 1255 (Fed. Cir. 2014). At least one District Court has described §101 challenges as a "difficult exercise" due to

[3] The foregoing description of the '627 Patent is explicitly for the purposes of addressing the issues at stake in Defendant's motion—including, whether the claim is directed to eligible subject matter under §101—and is not a description of the novelty of the '627 Patent under §§ 102 and 103, which is not at issue in Defendant's motion.

[4] Other District Courts have applied the clear-and-convincing evidence standard to § 101 challenges. *See e.g., Bristol-Myers Squibb Co. v. Merck & Co., Inc.*, No. 15-560-GMS, 2016 WL 1072841 at *1 n.1 (D. Del. Mar. 29, 2016) ("Here there is not clear and convincing evidence that ineligibility is the only plausible reading of the patent."). A case in this District recently held that the clear-and-convincing standard does not apply to a § 101 challenge, but the Court relied on a concurring opinion from *Ultramercial* for the proposition that the "Federal Circuit appears to have resolved this question," instead of a majority opinion. *See TNS Media Research, LLC v. Tivo Research & Analytics, Inc.,* No. 11-4039-SAS, 2016 U.S. Dist. LEXIS 21218, at *2 (S.D.N.Y. Feb. 22, 2016).

the "evolving state of the law," especially because "it is less than clear" how to resolve these issues "in light of the Federal Circuit's past characterization of §101 eligibility as a 'coarse'" eligibility filter. *Treehouse Avatar, LLC v. Valve Corp.*, No. 15-427-SLR, 2016 WL 1129726, at *6 (D. Del. Mar. 22, 2016).

Here, the burden is even higher. Even though the '627 Patent application was pending before the Patent Office for more than 14 years, the Office never rejected the application for being directed to ineligible subject matter.[5]

B. *Alice* Step 1: The '627 Patent improved handheld devices themselves.

Defendant attempts to pigeon-hole the '627 Patent claims into the following abstract idea: "securely purchasing an 'authorization certificate' (e.g., theater tickets)." (Mot.[6] at 10). Elsewhere, Defendant contends the claims are simply directed to "pre-existing commercial practices." (Mot. at 11). But these descriptions oversimplify the inventions, misstate the problem they solved, and unfairly characterize the claims in a way that allows Defendant to bootstrap its §101 argument.

Courts have cautioned against accepting a defendant's purported abstract idea on a motion to dismiss. The Supreme Court in *Alice* stated, "[a]t some level, 'all inventions . . . embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.'" *Alice Corp. Pty. Ltd., v. CLS Bank Int'l,* 134 S. Ct. 2347, 2354 (2014) (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1293 (2012)). Indeed, "every invention can be reduced to some form of an abstract idea," and thus, *Alice* step one requires more than simply asking "whether the Court is able [to] reach into a patent and extract an abstract idea from which to determine patent-eligibility." *SimpleAir, Inc. v. Google Inc.*, No. 14-11, 2015 WL 5675281, at *4 (E.D. Tex. Sept. 25, 2015). One Court in this District has observed that even "Alexander Graham Bell's patent could be said to claim the abstract idea of oral communication." *Stanacard v. Rubard, LLC*, No. 12-5176-CM-MHD, 2015 U.S. Dist. LEXIS 157345, at *3 (S.D.N.Y. Nov. 18, 2015) (quoting *Messaging Gateway Solutions v. Amdocs, Inc.*, No. 14-732-RGA, 2015 WL 1744343, at *5 (D. Del. 2015)).

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[5] The Patent Office rejected earlier versions of the claims under § 101 (*see* Irwin Decl. Ex. 2 at 7-8), but the substance of that rejection was for allegedly mixing two classes of invention in the pending claims—not that the claims were directed to ineligible subject matter. Defendant does not appear to dispute this. (*See* Mot. at 7).
[6] References to (Mot. at __) are to Samsung's Memorandum of Law in Support of Its Partial Motion to Dismiss for Failure to State a Claim (Dkt. 26).

Defendant cites numerous cases but conveniently brushes aside *DDR Holdings v. Hotels.com*, one of the most instructive to date. There, the Federal Circuit enunciated the key distinction between claims directed to an ineligible business practice and those that are not:

> [The] claims stand apart because they do not merely recite the performance of some business practice known from the pre-Internet world along with the requirement to perform it on the Internet. Instead, ***the claimed solution is necessarily rooted in computer technology*** in order to overcome a problem specifically arising in the realm of computer networks.

DDR Holdings, 773 F.3d at 1257 (emphasis added).

The crux of Defendant's argument is that the '627 Patent claims fail *Alice* step one because they "simply break the abstract idea into a number of steps consisting of routine communications over the Internet, using generic hardware." (Mot. at 11-12). But here, the claim is directed to an improved "wireless handheld device," not to the performance of a "business practice" or to a "number of steps". Even so, Courts have held that that does not end the inquiry: a claim "involving a computer and the internet may be broken down into a series of steps performed by a human does not resolve whether such [claim] is an 'abstract idea.'" *Improved Search, LLC v. AOL, Inc.*, No. 15-262-SLR, 2016 WL 1129213, at *9 (D. Del. Mar. 22, 2016).

As discussed in more detail above (*see* Sec. I.A), the '627 Patent claims address a problem specifically "rooted in computer technology" that is particular to handheld devices: for a ticket downloaded to a mobile device, how can it be redeemed at the theater to gain entry? That problem has nothing to do with use of the Internet. It has nothing to do with automating a business practice over the Internet. Rather, this problem is specific to a handheld device—how to improve it so that it can store and redeem an electronic ticket where that ticket is not self-validating. That is not a "business practice known from the pre-Internet world." *Improved Search*, 2016 WL 1129213 at *3. In fact, this problem did not exist in the pre-Internet world, in part, because hard-copy tickets and electronic tickets issued from a merchant's system were self-validating. It is a problem with handheld devices themselves, and with the technological problems that arise from using tickets on handheld device—thus a "problem specifically arising in the realm of computer networks." *DDR Holdings*, 773 F.3d at 1257. As shown in Sec. I.A, the '627 Patent claims contain specific limitations that bear directly on solving this problem. Defendant's "abstract idea" ignores these limitations. That is fatal. *See SimpleAir,* 2015 WL 5675281, at *4 (conclusory argument "which ignores significant claim limitations" was "not enough for Defendants to meet their burden of establishing that the Patents-in-Suit are directed to an abstract idea"); *Trading Techs. Int'l, Inc. v. CQG, Inc.*, No. 05-4811, 2015 WL 774655, at *4 (N.D. Ill. Feb. 24, 2015) (rejecting argument that claims were directed at "abstract idea" that rested on "ignor[ing] much of the details of the representative claims").

The claims also present a specific physical solution to a more general problem—how to construct and program a device with the capability to buy, store, use and validate an electronic ticket. That is a problem specifically rooted in computer technology, and more specifically, in mobile device technology, because the ordered combination of hardware and software that is claimed (*see* Sec. I.A) sharply avoids preempting all "secure purchases of tickets."

Ignoring these claim limitations, Defendant cherry-picks language from the '627 Patent's specification to argue the claims are simply limited to "purchasing" transactions on a handheld device. (*See* Mot. at 11). The '627 Patent's specification is over 100 pages long, and yet Defendant cites nary little but the same quote over and over (three times) (*see* Mot. at 1, 3 and 11): "transactions would function in much the same way as offline transactions." ('627 Patent col. 16:63-64). The "transactions" from that quote, however, do not relate to the claimed ticketing transactions, but instead concern micropayments to a third-party (a separate invention not claimed in the '627 Patent). The sentence right before states: "All transactions in every direction would generate a micropayment or other host system." ('627 Patent at 16:61-63).

Finally, Defendant cites cases that actually illustrate the '627 Patent is not directed to an abstract business practice. In *Inventor Holdings, LLC v. Bed Bath & Beyond Inc.*, 123 F. Supp. 3d 557, 561 (D. Del. 2015), the invention related to business problems (offering customers more payment options), rather than to problems related to a specific device (how to use and validate a ticket stored on a handheld device.) In *Inventor Holdings, LLC v. Gameloft, Inc.*, No. 14-1072-LPS, 2015 WL 5769220, at *8, *11 (D. Del. Sep. 30, 2015), the Court found the claims embodied an abstract idea because the Plaintiff did not "solve a problem *specific* to mobile devices" and the claimed mobile device was "not integral" to the claimed method. Here, as discussed in Sec. I.A, the claims describe improved wireless handheld devices themselves, which are far from preempting all "secure purchases of tickets." In *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1355 (Fed. Cir. 2014), the claims failed because they were "squarely about creating a contractual relationship—a transaction performance guaranty—that is beyond question of ancient lineage." (citations omitted). Here, the '627 Patent solves problems caused by the shortcomings of the handheld device itself—such as how to *use* and *validate* a ticket existing on a handheld device—rather than simply automating a commercial transaction. In *Mort. Grader,* *Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1324 (Fed. Cir. 2016), the claims were directed to an abstract idea because "the series of steps covered by the asserted claims . . . could all be performed by humans without a computer." Here, the claims are not directed to a series of steps, but rather address problems such as how to redeem tickets existing on a handheld device—not a problem of automation, but one specifically requiring improvements to then-existing technology.

C. *Alice* Step 2: The '627 Patent adds an "inventive concept."

Even if the claims are directed to an abstract idea, they contain sufficiently more to preserve their eligibility as patentable subject matter.

With respect to *Alice* step two, Defendant claims that this step requires a search for an "inventive concept." (Mot. at 8). This is not a determination of whether the claims of the '627 Patent are novel. Indeed, in *Alice*, the Supreme Court clarified that the "inventive concept" is not a search for novelty, but rather an assurance that the patent does not simply claim the abstract idea itself: "We have described step two of this analysis as a search for an inventive concept—i.e., an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself." *Alice,*134 S. Ct. at 2357 (citations omitted). Thus, to survive under *Alice* step two, a patentee bears no burden of proving the patent is "inventive"—as Defendant repeatedly suggests, (*see e.g.,* Mot. at 15 ("this is not inventive"))—but only that it claims at least one element or an ordered combination of elements that preclude the patent from preempting the abstract idea itself. *Diamond v. Diehr*, 450 U.S. 175, 190 (1981) ("The question . . . whether a particular invention is novel is wholly apart from whether the invention falls into a category of statutory subject matter.") (citations omitted); *see also Trading Techs*., 2015 WL 774655, at *5 ("The 'inventive concept' step of the

Alice analysis requires something different than [35 U.S.C. § 102 (novelty) and 35 U.S.C. § 103 (non-obviousness)].”).

Even if the asserted claims of the ‘627 Patent are directed to Defendant’s purported abstract idea—which they are not—they recite “an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.” *Alice*, 134 S. Ct. at 2357. As discussed above (*see* Sec. I.A), the claims added elements to existing devices that barred them from simply claiming the abstract idea (as described by Defendant) of “securely purchasing a [ticket].” (Mot. at 10). These elements include: non-generic hardware (e.g., short-range wireless communication hardware) in combination with specific software instructions for execution by a microprocessor (e.g., allowing for the downloading and storage of a ticket that can later be redeemed using just the improved mobile device). *See Messaging Gateway*, 2015 WL 1744343, at *6 (holding improvements to mobile devices can solve “a specific problem arising in the realm of mobile device-to-Internet communication.”).

Tellingly, Defendant flat-out ignores the machine-or-transformation test. The Supreme Court has held that the machine-or-transformation test is a “useful and important clue” to patentability under § 101. *Bilski v. Kappos*, 561 U.S. 593, 604 (2010). Under the test, claims are patent eligible if “tied to a particular machine or apparatus” or “transforms a particular article into a different state or thing.” *SiRF Tech. v. Int'l Trade Comm'n*, 601 F.3d 1319, 1332 (Fed. Cir. 2010) (internal quotations omitted). For “a machine to impose a meaningful limit . . . it must play a significant part in permitting the claimed method to be performed.” *Id.* at 1333. Here, the claims are tied to a particular machine—i.e., the “wireless handheld device” itself. The claimed handheld device improved existing devices with short-range wireless communication hardware combined with validating software (*see* Sec. I.A). As discussed above, the patent teaches that the claimed machine is not necessarily a phone, but includes, in a preferred embodiment, "LCD display **1109**, . . . (input keys) **1111**, an optional biometric chip **1105** , and an infrared transceiver **1100,**" among other communication and processing hardware required in the claim. ('627 Patent at 34:36-39). Thus, the claim is clearly not "solely [] an obvious mechanism for permitting a solution to be achieved." *Id.*

Defendant cites multiple cases suggesting that using the Internet is insufficient to rescue claims from §101 challenges. (*See* Mot. at 14). However, that misses the point. Using a downloaded ticket at a physical box office does not require the Internet at all. In fact, short-range wireless communication hardware is not for communicating with the Internet, nor is it described in the '627 Patent for allowing communications with the Internet. This illustrates how the '627 Patent claims are not an abstract business practice simply hoisted onto the Internet.

Defendant argues that the '627 Patent does not purport to have invented or improved short-range wireless communications hardware or protocols. (Mot. at 12). That also misses the point. As instructed by *Alice*, the key inquiry is whether the patent adds "an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself." *Alice*, 134 S. Ct. at 2357. (emphasis added). As explained above (*see* Sec. I.A), by adding non-generic hardware (e.g., short-range wireless communication hardware) combined with specialized software (e.g., for validating a ticket on a mobile device that is not self-validating), the '627 Patent adds enough "more" to avoid preempting all instances of the purported abstract idea—"secure purchases of a ticket." Simply purchasing a ticket with a smartphone is not enough to infringe the '627 Patent's claims. For example, a phone used to securely purchase a ticket, which is mailed to you, would not infringe. *See Treehouse,* 2016 WL 1129726, at *9 (finding an "inventive concept" where the claims "do not represent the 'routine and conventional' use of a computer" and "provide sufficient specificity to overcome preemption concerns") (citations omitted).

Defendant argues that "short-range wireless communication hardware" is generic and has been "well-known" for "decades." (Mot. at 12). Yet, Defendant relies on nothing to support this conjecture. None of the cases cited by Defendant identifies "short-range wireless communication hardware" as "generic." (*See* Mot. at 13). Nothing in the patent describes it as "generic" or known for "decades". Indeed, nothing in the pleadings justify Defendant's contention that certain hardware was "generic" or "well-known" for "decades," especially considering that over 16 years has passed since the priority date of the '627 Patent. Defendant cannot prevail on its motion to dismiss by unilaterally declaring certain hardware "generic".

Further, Defendant's contention that the short-range hardware was known for "decades" must be assessed against the patent's priority date (2000), not today's date. Measuring the eligibility of patent claims against contemporary technology is improper. *See CLS Bank Intern. v. Alice Corp. Pty. Ltd.,* 717 F.3d 1269, 1301 n.4 (2013) (en banc) ("Using what has become routine in 2013 to determine what was inherent in a concept in the early 1990s injects hindsight into the eligibility analysis and fails to recognize that patent eligibility, like all statutory patentability questions, is to be measured as of the filing date."); *see also Treehouse*, 2016 WL 1129726, at *9. Thus, a person of ordinary skill's understanding of short-range wireless hardware as of 2000—and whether adding that hardware to the other hardware and software components described in the '627 Patent claims was not inventive—warrants additional discovery, including expert opinion testimony. This alone warrants denial of Defendant's motion.

Going a step further, the prosecution history—which Defendant admits is before the Court on a motion to dismiss for patent eligibility (Mot. at 7 n.2)—shows that the short-range hardware was used in a non-generic way. *See Ronald A. Katz Tech. Licensing, L.P. v. FedEx Corp.*, No. 15-2329-JPM-TMP, 2016 WL 1179218, at *6 (W.D. Tenn. Mar. 24, 2016) (denying § 101 challenge where "the claim is directed to a particular method of restricting access, which could render it patent-eligible" because "unlike claims directed to nothing more than the idea of doing that thing on a computer, claims directed at a specific way to do something on a computer are likely patentable") (quoting *CLS Bank Int'l v. Alice Corp. Pty. Ltd.*, 717 F.3d 1269, 1302 (Fed. Cir. 2013), and stating: "finding that 'unlike claims directed to nothing more than the idea of doing that thing on a computer,' claims directed at a specific way to do something on a computer are likely patentable.").

Here, during prosecution, the reference cited by the Examiner for purportedly disclosing short-range wireless hardware was U.S. Patent No. 5,884,271 to Pitroda.[7] (Silbersher Decl. Ex. B at 6). The "short-range wireless communication hardware" is used in combination with wireless communication hardware and specialized software to download and redeem a ticket stored on a handheld device to gain entry to the theater. (*See e.g.*, '627 Patent Claim 4; *see also* at 8:9-15 (describing that handheld device is "transported by the user to the location of the event" for communication with the "POP eTicket terminal" where the "eTicket certificate would be verified")). By contrast, even if Pitroda disclosed a card equipped with infrared technology, the card did not have the capability to use infrared technology to both download a ticket and communicate that ticket along with validating information to the theater. (Silbersher Ex. C).

Indeed, the combination of the short-range wireless hardware with the validating software

[7] The Examiner expressly stated that U.S. Patent No. 5,892,900 to Ginter "does not appear to expressly disclose that the device uses short range wireless communication." (Silbersher Decl. Ex. B at 6).

contributed to allowance of the claims over Pitroda. Immediately after Mr. Shore made the argument below to the Examiner, the pending claims were allowed:

> The asserted combination of Ginter and Pitroda [the cited prior art] fail to disclose the claimed wireless handheld device that downloads an authorization certificate, **activates a communication** by a host computer system of the authorization certificate and redemption security information to a content provider computer system (**for comparison with data provided by the wireless handheld device**), and communicates authorization and redemption information through a **short-range communication** with a point-of-sale device for the content provider.

(Silbersher Decl. Ex. A at 10 (emphasis added); Ex. C at 2-3). This contribution creates a factual issue over Defendant's contention that these elements were "non-inventive" or "without an inventive concept". (*See* Mot. at 13, 16-17). This factual issue, which must be construed in favor of Sentegra on a motion to dismiss, alone warrants denial of Defendant's §101 challenge at the pleading stage.

Similarly, Defendant ignores the claimed software programming. The claim contains a limitation describing what happens when the microprocessor executes the software instructions: the device "activates" or "triggers, as claimed, the host computer device sending a copy of the authorization certificate and relevant security information to the merchant's computer system." (Silbersher Decl. Ex. A at 10). Defendant attempts to reduce this validating software limitation to the idea of: "Ticketmaster® confirming the purchase with the theater." (Mot. at 6). This is problematic for two reasons. First, it adds yet another purported abstract idea, which the Federal Circuit has identified as a hallmark that a defendant's abstract idea is incorrect. *See DDR Holdings*, 773 F.3d at 1257 ("NLG's own varying formulations of the underlying abstract idea illustrate [the] difficulty" of "identifying the precise nature of the abstract idea."). Second, this ignores that the '627 Patent improved existing handheld devices by equipping them with the capability to actually redeem the tickets themselves. As explained, this limitation is "useful for validating electronic redemption of the electronic authorization certificates, such as, for example, electronic tickets." (Silbersher Decl. Ex. A at 11). This is considerably different from the purported abstract idea of "Ticketmaster® confirming the purchase with the theater" as well as sufficiently "more" to avoid preempting all instances of that purported abstract idea.

These fact issues warrant denial of Defendant's motion. Courts have held that whether a claim is "innovative enough . . . may well involve issues of fact relating to the state of the art in the technological environment involved." *Treehouse*, 2016 WL 1129726, at *9. This inquiry is "more appropriately addressed after discovery in the context of a motion for summary judgment." *Id. See also Bristol-Myers Squibb,* 2016 WL 1072841, at *1 n. 1 (denying motion to dismiss for lack of eligible subject matter; "Whether the claims amount to an implementation step is a complicated factual determination that the court could better resolve after discovery.") (citations omitted). Here, at least the following fact issues exist: Whether short-range hardware was "generic" as of 2000? Whether the '627 Patent uses short-range hardware on a handheld device in a non-generic way? Whether its use in combination with the validating software supplies an "inventive concept"? Defendant attempts to quench these fact issues with nothing but conjecture. But they must be resolved in Sentegra's favor on a motion to dismiss.

Finally, and separately, even if short-range wireless hardware standing alone was "generic" as of 2000—which remains a factual issue that Sentegra disputes at the pleading stage—*Alice* step two also requires consideration of the elements both individually **and as an ordered combination**, and "the fact that one or more of the [elements] . . . may not, in isolation, be novel or independently eligible for patent protection is irrelevant to the question of whether the claim[] as a whole recite[s] subject matter eligible for patent protection under § 101." 134 S. Ct. at 2355 (emphasis added). Defendant glosses over its burden—especially high at the pleading stage—of showing **the ordered combination** is also ineligible, stating simply — "the claims simply recite a generic mobile phone performing an ecommerce transaction; this is not inventive." (Mot. at 15). That is wrong. The '627 Patent invented a new ordered combination of hardware combined with specialized software, including *inter alia*, in a preferred embodiment, "LCD display **1109**, . . . (input keys) **1111**, an optional biometric chip **1105**, and an infrared transceiver **1100,**" among other communication and processing hardware required in the claim. ('627 Patent at 34:36-39). FIG. 20a further illustrates a new, specific device comprised of an ordered combination of hardware and software for buying, storing, using and redeeming a ticket existing on a mobile device." (*See* '627 Patent at FIGS. 19a-c, 20a, 20b-1, 20b-2, 20c-f). Defendant repeatedly argues that the '627 Patent did not purport to have "invented or improved" these components. (*See e.g.,* Mot. at 16-17). But, under that logic, patents claiming new ordered combinations of known objects would never be directed to eligible subject matter under §101. That is not the law.

D. The other claims add something more to preempt claiming an abstract idea.

Defendant's motion focuses on Claim 1 as a representative claim for purposes of §101 analysis. However, the numerous claims in a patent do not rise and fall together—they must be individually analyzed. *Jones v. Hardy,* 727 F.2d 1524, 1527 (Fed. Cir. 1984) (holding that "each claim must be considered as defining a separate invention").

Claims 4 and 11-16 specifically recite "communicating, using said short-range wireless communication hardware . . . to a point-of-sale device for said particular merchant." (*See e.g.,* '627 Patent at 63:60-65). This element adds significantly more to Defendant's purported abstract idea because, with this limitation, the '627 Patent claims would hardly preempt every "secure purchase of a ticket" over the Internet or with a handheld device.

Defendant argues that the '627 Patent does not purport to have invented point-of-sale devices or short-range wireless communications hardware or protocols. That misses the point. Instead, as instructed by *Alice*, the key inquiry is whether the patent claims add "an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself." *Alice*, 134 S. Ct. at 2357. Defendant has defined its abstract idea as "securely purchasing a [ticket]." (Mot. at 10). But as explained above (*see* Sec. I.A), the patent solved a problem of how to *redeem* a ticket existing on a mobile device that did not plague traditional hard-copy tickets or electronic tickets issued by merchants.

In an attempt to salvage its argument, Defendant conveniently alters the abstract idea for Claim 4 from the purported abstract idea for the other claims: "a person showing their theater ticket to a box office usher." (Mot. at 17). The Federal Circuit has cautioned that varying descriptions of the abstract idea indicate that the patent is not, in fact, directed to an abstract idea. *See DDR Holdings*, 773 F.3d at 1257.

Regardless, for all the reasons discussed in Sec. I.A, the '627 Patent provides solutions to technological problems with handheld devices—how to *redeem* a ticket—problems not encountered when, for example, a customer presents a paper ticket at a theater. The patent describes specific hardware and software, including the short-range hardware as well as the validating software, to preclude preempting all uses of presenting "a theater ticket to a box office usher."

With respect to Claims 6 through 16, they add a "biometric data reading device." Defendant wages the same arguments against this hardware as it does against the "short-range wireless communication hardware", (*see* Mot. at 17 ("the patent does not purport to have invented or improved such a device”). This hardware sharply reduces the likelihood these claims preempt “secure purchases of tickets.” For the reasons discussed above, this argument also fails.

III. The ‘627 Patent is not indefinite under *IPXL*.

A. It is improper to invalidate a claim under *IPXL* before the *Markman* hearing.

Patents are presumed to be valid under 35 U.S.C. § 282, and to invalidate a patent, a defendant must do so under the high standard of clear and convincing evidence. *See Microsoft Corp. v. i4i Ltd. P’ship,* 131 S. Ct. 2238, 2242 (2011)*; Takeda Chem. Indus., Ltd. v. Alphapharm Pty., Ltd.*, 492 F.3d 1350, 1355 (Fed. Cir. 2007). Courts typically address the indefiniteness of a patent claim either during or after claim construction (i.e., the *Markman* hearing). *See* Local Patent Rule 7 (identifying the use of Invalidity Contentions to advance §112 arguments prior to claim construction).

Defendant suggests that in a prior case against LG Electronics, Sentegra agreed that LG’s motion under *IPXL* could be heard before the *Markman* hearing. That is false. The letter cited to by Defendant plainly shows otherwise. (Silbersher Decl. Ex. D (“The parties dispute whether a Markman proceeding is necessary as part of the Court's handling of the [IPXL] Motion . . .”; “Sentegra submits that to resolve the [IPXL] Motion, the Court will need to construe numerous other terms in the claim that bear directly on the question of whether the claim is directed to a device with specific functional capabilities [including] . . . ‘a microprocessor programmed for executing’, . . . ‘said microprocessor, executing’ . . . [and thus] in order to resolve LG's [IPXL] Motion, this Court will need to engage in claim construction . . .. .”)). Thus, for the reasons shown below, because claim construction of the “microprocessor, executing” limitations is necessary to resolve this issue, Defendant’s motion is premature.

B. The claims of the '627 Patent do not contain method limitations.

The Federal Circuit recently confirmed that "apparatus claims are not necessarily indefinite for using functional language." *UltimatePointer, L.L.C. v. Nintendo Co., Ltd.*, -- F.3d --, No. 2015-1297, 2016 WL 798354, at *9 (Fed. Cir. Mar. 1, 2016) (quoting *Microprocessor Enhancement Corp. v. Texas Instruments Inc.*, 520 F.3d 1367, 1375 (Fed. Cir. 2008) ("MEC")). An apparatus claim that "is clearly limited to a[n apparatus] possessing the recited structure and capable of performing the recited functions," is not invalid as indefinite. *UltimatePointer*, 2016 WL 798354 at *9 (quoting *MEC*, 520 F.3d at 1375).

The claim in *UltimatePointer* was held not to be invalid as indefinite under *IPXL*. One of the challenged claims recited:

> 1. An apparatus for controlling a feature on a computer generated image, the apparatus comprising:
> a handheld device including:
> an image sensor,
> said image sensor **generating data** related to the distance between a first point and a second point . . . .

(*UltimatePointer*, 2016 WL 798354, at *4).

The Federal Circuit found this claim was not indefinite because "the 'data generating' limitations only indicate that the associated structures have this capability (for example, the image sensor and processor in claim 1) and do not require that any data be actually generated by the user." *Id.* at *9.

The same logic applies here. As shown below, the claims in *UltimatePointer* are drafted in a manner strikingly identical to those in the '627 Patent. In particular, the '627 Patent claims discuss what happens when the microprocessor is in the state of "executing" different sets of software instructions. Thus, the '627 Patent claims only indicate that the associated structure (microprocessor) has the capability to execute the first or second set of program instructions—

not that any program instructions need be actually executed by a user. Thus, like the claims in *UltimatePointer*, the ‘627 Patent claims “do not recite functionality divorced from the cited structure” and “do not reflect an attempt to claim both an apparatus and a method, but instead claim an apparatus with particular capabilities.” *Id.*

***UltimatePointer* (claim 1)**	**‘627 Patent (claim 1)**
“handheld device”	“wireless handheld device”
“image sensor”	“microprocessor”
“said image sensor **generating** data related to the distance between a first point and a second point”	“said microprocessor, **executing** a first set of executable program instructions . . . “said microprocessor, **executing** the second set of executable computer program instructions”

For the reasons below, Defendant’s *IPXL* motion should denied as a matter of law. However, at minimum, Defendant’s motion is premature for the reasons discussed above (Sec. III.A) at the pleading stage because this is an issue for claim construction, which warrants a *Markman* hearing.

Defendant ignores the “executing” limitations describing the microprocessor’s capabilities, as well as the striking similarity between this case and *UltimatePointer* (*see* Mot. at 20), and instead focuses on the limitations following the “executing” limitations—“accesses”, “requests”, “receives”, “communicates”, and so forth (hereinafter, the “Microprocessor Limitations”).

Yet, Defendant’s focus on the Microprocessor Limitations is misguided. These limitations simply modify and describe what happens when the software is executed, or in other words, what happens when the microprocessor is in the state of executing the software instructions. By modifying the “executing” limitations—which are clearly a capability of the claim under *UltimatePointer*—the Microprocessor Limitations simply elucidate the results of that capability. They are not required steps of the claim.

Defendant makes a number of grammatical arguments that are immaterial in light of *UltimatePointer*. Defendant argues that the Microprocessor Limitations are in present tense (Mot. at 22-23), and that they phrased differently from other terms in the same claim (Mot. at 23). But these distinctions are irrelevant. The Microprocessor Limitations describe what happens when the microprocessor executes the first or second set of software instructions, which is clearly a capability of the microprocessor under *UltimatePointer*. Thus, the Microprocessor Limitations just further elucidate the microprocessor's capability. They are not "functionality divorced from the cited structure," i.e., the microprocessor. *UltimatePointer*, 2016 WL 798354, at *9. The phrasing or tense of these limitations does not change that.

Defendant also argues that the '627 Patent's inventor knew how to recite capability when he wanted to. (Mot. at 23). But as explained, the phrasing of "microprocessor, executing" is a clear recital of capability under *UltimatePointer*. The Microprocessor Limitations that follow further elucidate that capability, rather than prove that the inventor chose "active verbs to indicate steps in a process that must be performed to infringe." (*Id.* at 24).

Defendant also argues that the '627 Patent claims require user action. This misreads the relevant case law. The cases cited by Defendant required clear, affirmative action by the user to infringe the patented claim. For instance, in *IPXL*, the claim expressly recited "the user ***uses the input means***." *IPXL Holdings, LLC v. Amazon.com, Inc.,* 430 F.3d 1367, 1384 (Fed. Cir. 2005) (emphasis added) (emphasis added). In *In re Katz*, the claim expressly recited "wherein said certain of said individual callers ***digitally enter data***." *In re Katz Interactive Call Processing Patent Litigation*, 639 F.3d 1303, 1318 (Fed. Cir. 2011) (emphasis added). The Court held it was unclear if the claim was "directed to user actions, not system capabilities." *Id.*

In contrast, neither the "executing" limitations nor the Microprocessor Limitations are performed by the user in the '627 Patent. Indeed, Defendant does not argue that they are. Rather, they are clearly capabilities of the microprocessor. Thus, there can be no uncertainty whether these limitations are "directed to user actions, not system capabilities." *Id.*

To save its argument, Defendant points to a wholly different limitation—the "accesses" limitation (Mot. at 24)—which recites:

> said **microprocessor**, **executing** the first step of executable computer program instructions, **accesses a content host computer device at an Internet-accessible address according to a user input** . . .

On its face, this limitation is not a "user action." There is no requirement that a user does *anything*. Rather, the claim expressly recites that it is the "microprocessor" executing the software—not a user. The "accesses" limitation may be in response to a user input ("*according to a user input*"), but it is not the action of a user inputting anything.

Defendant also suggests the "accesses" limitation is the "trigger for all of the microprocessor steps that follow." (Mot. at 24). But that is irrelevant for two reasons—it does not claim an affirmative action by any user, and it is a trigger for "executing" by the microprocessor, a *capability* of the claim, not a required step. This is in stark contrast to the affirmative actions required by the user in *IPXL* ("user uses the input means") and *In re Katz* ("callers enter data").

The other cases cited by Defendant are equally distinguishable. In *H-W Tech., L.C. v. Overstock.com, Inc.*, 758 F.3d 1329, 1335 (Fed. Cir. 2014), the claim recited affirmative user actions ("wherein said user completes . . ." and "wherein said user selects . . ."), and the patentee conceded that the claim was invalid under *IPXL* in light of the Court's construction that a *person* must perform these actions. In *E-Watch Inc. v. Apple, Inc.*, No. 13-01061-JRG-RSP, 2015 WL 1387947, at *5 (E.D. Tex. Mar. 25, 2015), the claim unequivocally recited affirmative user actions ("operation of the input device **by the user**," the phrase "movement **by the user** of the portable housing commonly moving the image collection device," and the phrase "movement **by the user** of the portable housing commonly moving the display"). In *Ariba, Inc. v. Emptoris, Inc.*, No. 07-00090, 2008 WL 3482521, at *7 (E.D. Tex. Aug. 7, 2008), the Court found, "the problem is that one of the key elements of claim 31 is a method step that is conducted by some person or system other than the claimed device." Here, Defendant does not argue any of the claimed limitations are performed by a person or device other than the claimed "wireless handheld device" or the "microprocessor" of that device.

Defendant also argues the '627 Patent claims were rejected under *IPXL* grounds during prosecution. (Mot. at 7). This actually undercuts Defendant's argument because the claims were subsequently amended to be "encoded with various sets of executable computer program instructions" that "distinctly claim the apparatus of the claimed invention." (Silbersher Decl. Ex. E at 17-18). After that, the *IPXL* rejection was expressly withdrawn by the Examiner. (Silbersher Decl. Ex. F at 3 sec. 7 (withdrawing rejections in Irwin Decl. Ex. 2 secs. 8-9)).

Finally, none of the dependent claims of the '627 Patent explicitly require user action of any sort, and thus none are indefinite under *IPXL*.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2016, I electronically transmitted the foregoing document and accompanying declarations and exhibits thereto to the Clerk of the Court using the ECF System for filing. The Clerk of the Court will transmit a Notice of Electronic Filing to all counsel of record who have consented to electronic service.

/s/ *Zachary D. Silbersher*
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